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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANDRE K. STUCKEY, JR., Defendant and Appellant.	B236422 (Los Angeles County Super. Ct. No. BA374188)

APPEAL from a judgment of the Superior Court of Los Angeles County. Drew E. Edwards, Judge. Affirmed.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul. M. Roadarmel, Jr. and Stephanie A Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Andre K. Stuckey, Jr. appeals from the judgment entered following a jury trial in which he was convicted of first degree burglary. He contends the trial court applied improper aggravating factors when it sentenced him to the upper term for the conviction. We affirm.

BACKGROUND

On the morning of April 24, 2010, University of Southern California (USC) dormitory resident Hannah Goodman encountered defendant in the "common space" of her residential unit on campus, his hand inches away from the open wallet of her suitemate, Emily Candaux, who was asleep in her room. Defendant ran out of the room and toward the stairwell. Goodman woke up Candaux, who checked her wallet and found her cash missing, including a folded $50 bill. Goodman called USC's Department of Public Safety. Responding USC public safety officers pursued defendant and, after a long chase, apprehended him on the campus. A search of his person recovered crumpled cash, a "neatly folded" $50 bill, two cell phones, jewelry, and watches. Defendant had no past or present affiliation with USC.

An information charged defendant with one count of first degree burglary (Pen. Code, § 459)[1] pertaining to the Goodman/Candaux residence and a second burglary count pertaining to another student dormitory residence defendant was alleged to have entered one half hour before he entered the Goodman/Candaux residence. It was further alleged that defendant had suffered a 2002 burglary conviction in California that constituted both a violent felony and a strike. (§§ 667.5, 1170.12.)

Defendant represented himself at trial, with standby counsel. The jury returned a guilty verdict as to the first burglary count but deadlocked on the second count. After trial, counsel was appointed for defendant, trial was held on the 2002 conviction, and the jury found the prior true.

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[1] Statutory references are to the Penal Code.

On March 24, 2011, the prosecutor filed a sentencing memorandum in which she argued that circumstances in aggravation included that the victims were particularly vulnerable because defendant went into their dorm room while they were asleep; the manner in which the crime was carried out indicated planning, sophistication or professionalism; defendant had suffered numerous prior convictions of increasing seriousness; defendant had served a prior seven-year prison term for a 2003 New York burglary; defendant's prior performance on probation had been unsatisfactory; and defendant's prior strike was for exactly the same crime of residential burglary of a college student's dormitory room. The memorandum included four incident reports from the Harvard University Police Department and one from University of California Los Angeles (UCLA) indicating defendant had burglarized several dorm rooms at those universities and others. The memorandum also included a fax from the United States District Court for the Western District of New York indicating defendant had previously been incarcerated in New York for burglary, criminal possession of stolen property and bail jumping. Finally, the memorandum contained a 2010 probation officer's report and printout of defendant's criminal record, indicating defendant had been convicted of petty theft, forgery and burglary in 1997, receiving stolen property in 1999, and burglary in 2000 and 2002.

In addition to these convictions, another 2010 probation report indicated defendant suffered convictions for petty theft in 1996; petit larceny, burglary, and trespassing in New York in 1997 and 1998; criminal trespass (several counts) and possession of stolen property in New York in 2002 and 2003; and bail jumping in New York in 2004. The report stated defendant had informed officers he had been diagnosed as being paranoid with hallucinations and took medication for those conditions. It stated he had sustained numerous felony convictions, was a multistate offender, and had performed poorly on probation in the past.

The prosecutor requested that defendant be sentenced to the upper term of six years, doubled, plus five years for the prior serious felony, for a total of 17 years.

Defendant again represented himself at the September 30, 2011 sentencing hearing. After lengthy argument was heard on defendant's motions for new trial and for arrested judgment, defendant stated he wanted to file a motion for a hearing pursuant to section 1204 (evidence in mitigation of punishment) in which he could present mitigating evidence. The court noted such a motion would be untimely and indicated it intended to impose sentence immediately. Defendant then stated, "I object." The court noted the objection for the record then proceeded to sentence defendant to 17 years. The court noted "the following circumstances in aggravation. Mr. Stuckey's long criminal history, that the victims in this case were potentially vulnerable. Mr. Stuckey's crimes are increasing in seriousness. Mr. Stuckey's prior performance on probation has been poor and that Mr. Stuckey has numerous convictions for exactly the same type of behavior for which he was convicted of in this case." It found no mitigating factors.

At the end of the hearing defendant stated he wanted to file a motion for stay of execution of judgment pending consideration of a habeas corpus writ he had filed in another department. The trial court indicated it would not stay execution of judgment, and any motion for a stay would be denied. Defendant replied, "I object." The court noted the objection for the record, dismissed count 2 pursuant to section 1385 (authorizing dismissal in furtherance of justice), and adjourned proceedings.

Defendant appealed.

DISCUSSION

Defendant contends the trial court considered improper aggravating factors when imposing the upper term of six years and violated the prohibition against dual use of facts by using the same facts to impose the upper term and add recidivism enhancements.

Defendant forfeited this challenge to his sentence by failing to raise it at sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 356.) Even if defendant had preserved the challenge for appellate review, it lacks merit.

A defendant convicted of first degree burglary may be sentenced to state prison for two, four or six years. (§ 461, subd. (a).) "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term

shall rest within the sound discretion of the court." (§ 1170, subd. (b).) The trial court has broad discretion to tailor the sentence to the particular case. The choices available include the decision to impose the lower or upper term instead of the middle term of imprisonment. As directed by the Legislature, the Judicial Council has promulgated rules to guide these choices. (§ 1170, subd. (a)(2), 1170.3; Cal. Rules of Court, rules 4.420, 4.421, 4.433, 4.437 [hereafter, rules].)

A defendant must object to preserve a claim "involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*People v. Scott*, *supra*, 9 Cal.4th at p. 353.) The reason for such a rule "is practical and straightforward. Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Ibid*.)

Defendant contends his sentence challenge is not forfeited because he objected twice at sentencing, and to the extent the objections were misdirected, the trial court gave him no meaningful opportunity to object. The record is to the contrary.

Defendant raised several objections at the sentencing hearing. He alludes specifically to two: He objected to the trial court's refusal to delay the hearing pending his motion for mitigation and to the trial court's refusal to stay execution of judgment pending resolution of a writ petition. Defendant did not object to the court's reliance on aggravating factors to impose the upper term or its failure to consider his mental problems. Had he done so, the court easily could have corrected any error.

Further, there is no merit to defendant's argument that he had no meaningful opportunity to object. The prosecution filed a sentencing memorandum six months before the hearing. In it, the prosecutor listed each of the aggravating factors upon which the trial court ultimately relied and requested the exact sentence the court ultimately imposed. Defendant was entitled in anticipation of sentencing to file a statement in mitigation urging specific sentencing choices and challenging the information and the recommendations contained in the sentencing memorandum and probation report.

(§ 1170, subd. (b); rule 4.437.) Argument and evidence could also have been presented at the hearing. (§ 1204; rule 4.433.) Between March and September 2011, defendant filed two motions, but neither challenged the prosecution's references to aggravating factors. At the hearing he was afforded substantial time to be heard on any matter, but he made no attempt to argue against consideration of any aggravating factor.

The record thus demonstrates that both before and during the hearing defendant was afforded ample opportunity to object to consideration of the aggravating factors upon which the trial court relied. His failure to do so waives the issue on appeal.

Defendant's sentence challenge fails on the merits as well. Defendant argues victim vulnerability was not a proper aggravating factor under the facts because the evidence showed he entered only the common area of the Goodman/Candaux residence, not the bedroom where Candaux was asleep. He also argues use of his prior convictions to impose the upper term was improper because a prior conviction was also used to impose recidivism enhancements. Finally, defendant argues that the court erred in considering the similarity of his prior convictions to be an aggravating factor because that similarity was indicative only of his undisputed mental illness, which is a mitigating factor the court ignored.

Had it not been forfeited, defendant's challenge would fail at the outset because, as noted, the trial court found numerous aggravating factors before imposing sentence: (1) Defendant's convictions were numerous and increasingly serious (rule 4.421(b)(2); (2) the victims were particularly vulnerable (rule 4.421, subd. (a)(3)); (3) defendant's prior performance on probation was unsatisfactory (rule 4.421, subd. (b)(5)); and (4) defendant had suffered prior convictions for the same crime (rule 4.421, subd. (c)). Only a single aggravating factor is required to impose the upper term. (*People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615.) Even if, as defendant argues, his 2002 burglary conviction could not be considered an aggravating factor, his other burglary convictions reflected only his mental illness, not recidivism, and the victims were not particularly vulnerable, the court would still have been within its discretion to impose the upper term

due to defendant's commission of numerous and increasingly serious crimes and his unsatisfactory performance on probation.

At any rate, even the aggravating factors defendant challenges were properly considered. First, although the trial court "may not impose an upper term by using the fact of any enhancement upon which sentence is imposed" (§ 1170, subd. (b); rule 4.420(c)), here defendant suffered *several* prior burglary convictions—in 1997, 2000, 2002, and 2003. His sentenced was enhanced based on only one of them—the 2002 California conviction. It was proper for the court to consider the other convictions for purposes of enhancement. Defendant's argument that his long criminal record was indicative only of his mental illness, a mitigating factor, and could not be considered as an aggravating factor, is patently meritless. To the extent defendant argues the trial court failed to consider his mental illness, nothing in the record supports the argument. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 582 ["The court is presumed to have considered all relevant factors unless the record affirmatively shows the contrary"].)

Defendant's second attribution of error, that the victims were not particularly vulnerable, is also patently meritless. Rule 421(a)(3), which governs imposition of determinate terms, identifies as an aggravating circumstance permitting imposition of the upper term the fact that "'The victim was particularly vulnerable.'" "The 'particularly vulnerable victim' factor supports imposition of the upper term if the victim is vulnerable 'in a special or unusual degree, to an extent greater than in other cases [and is] defenseless, unguarded, unprotected, accessible, assailable . . . susceptible to the defendant's criminal act.' [Citation.]" (*People v. Clark* (1990) 50 Cal.3d 583, 638.) "'Particular vulnerability'" is determined in light of the "total milieu in which the commission of the crime occurred . . . ." (*People v. Price* (1984) 151 Cal. App. 3d 803, 814.) "Both the personal characteristics of the victim and the setting of the crime may be considered." (*Ibid.*) Here, defendant entered the common area of a dormitory residence and stole the wallet of a student sleeping elsewhere in the suite. The court was within its discretion to consider the sleeping victim to be particularly defenseless, unguarded,

unprotected, and accessible. It makes no difference that defendant did not enter the bedroom where the victim slept.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.